Supreme Court of the United States

OCTOBER TERM, 1943

No.

ARCHIE C. DAVIS,

Petitioner,

—against—

SHELL UNION OIL CORPORATION,
ASIATIC PETROLEUM CORPORATION,

Defendants,

—and—

COMPANIA de PETROLEO SHELL de COLOMBIA;
N. V. KONINKLIJKE NEDERLANDSCHE MAATSCHAPPIJ TOT EXPLOITATIE VAN PETROLEUMBRONNEN IN NEDERLANDSCHE-INDIE (ROYAL DUTCH COMPANY FOR THE WORKING OF PETROLEUM WELLS IN THE NETHERLANDS INDIES);
THE SHELL TRANSPORT & TRADING COMPANY, LTD.;
N. V. de BATAAFSCHE PETROLEUM MAATSCHAPPIJ (THE BATAVIAN PETROLEUM COMPANY);
THE ANGLO-SAXON PETROLEUM COMPANY, LTD.; and
ASIATIC PETROLEUM COMPANY, LTD.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below.

The opinion of the District Court for the Eastern District of New York upon granting the order which was the

subject of the appeal dismissed by the Circuit Court of Appeals has not yet been officially reported, but it is printed in full in the record (R. 34-49). Similarly, the three-line per curiam opinion of the Circuit Court of Appeals for the Second Circuit dismissing the petitioner's appeal from the District Court judgment has not yet been officially reported, but is printed in the record (R. 26).

Jurisdiction of This Court.

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code (28 U. S. C. §347).

The decision of the Circuit Court of Appeals herein is, in our view, in conflict with decisions of this Court, discussed in Points I and II, *infra*, and of another Circuit Court of Appeals, discussed in Point IV, *infra*, on the same matter. If not in conflict with the said decisions, it has disposed of an important question of federal appellate jurisdiction which has not been, but should be, settled by this Court, and it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision (Supreme Court Rule 38, par. 5 [b]).

The order of the Circuit Court of Appeals (R. 49) to be reviewed herein is dated and was filed March 2, 1944, and the judgment of the District Court, from which the petitioner's appeal was dismissed, was entered in said Court on November 20, 1943 (R. 24).

Statement of the Case.

The material facts of the case are stated in the foregoing petition, and in the interest of brevity are not repeated here.

Specification of Errors.

The Circuit Court of Appeals for the Second Circuit erred:

(1) In making the order dated March 2, 1944, granting the respondents' motion to dismiss the petitioner's appeal from the District Court judgment, which had finally dismissed the complaint for want of jurisdiction, as to all six defendants who attacked jurisdiction.

(2) In holding that the said judgment of the District Court herein was not a final judgment, within the meaning of Section 128 of the Judicial Code (28 U. S. C. §225).

ARGUMENT

POINT I.

Section 128 of the Judicial Code (28 U. S. C. §225) does not call for the narrow interpretation of the requirement of finality placed upon it by the Second Circuit Court of Appeals, and that Court's ruling herein is inconsistent with the intent of the statute.

Since their creation in 1891, the Circuit Courts of Appeals have possessed "appellate jurisdiction to review by appeal *final decisions*" Judicial Code, §128 (28 U. S. C. §225). The meaning of the phrase "final decisions" has been the subject of many critical studies and conflicting views. See Crick, *The Final Judgment as a Basis for Appeal,* 41 Yale L. J. 539; and Note, *Finality of Judgments in Appeals from Federal District Courts,* 49 Yale L. J. 1476. A leading authority (3 *Moore's Federal Practice,* pp. 3391-2) has said that:

> "* * * Many attempts at setting out the essentials of finality have been made by courts and text writers. But the most which can be safely said of a final judgment is that it must be determinative of the controversy in respect of which it is given. A judgment may be final, where some of the issues have been separated from the main suit and determined without reference to the proceedings in the main suit. * * *"

There appears to be general agreement, however, that the so-called "final judgment rule" was designed only to avoid "the necessity of examining successive appeals or writs of error in the same case" (*Heike* v. *United States*, 217 U. S. 423, at p. 430) and to forbid "piecemeal disposition on appeal of what for practical purposes is a single controversy" (*Cobbledick* v. *United States*, 309 U. S. 323, at p. 325).

Economy of appellate review is both understandable and desirable, especially in this Court which is *the* court of final judgment. But when a Circuit Court of Appeals distorts the statutory rule, as heretofore applied by this Court, to a degree which violates the intent of its authors by making the procedure for obtaining a final determination of the suit *more* cumbersome and time-consuming rather than *less*, and when it expresses the opinion that it is authoritatively bound to do so, the time has come, we submit, for this Court to re-examine the basis of the interpretation.

The judgment of the District Court herein has put an end to this litigation with respect to six defendants, the respondents herein. As to them nothing further remains. The Court below has finally determined the controversy as to whether or not they are doing business in this jurisdiction, a controversy in which the other two defendants did not join. The learned Court below has held that it is precluded from reviewing the District Court's judgment, pre-

sumably because it believes such a review would invite "successive" appeals.

Actually, if that Court should now review the District Court judgment and reverse, a single trial would proceed as to all eight defendants. On the other hand, if an appeal does not lie now, a trial will proceed as to only two defendants and a judgment on the merits one way or the other may be obtained a year or two hence. Then, on the Circuit Court's theory, there will be two appeals before it, one on the merits as to two defendants and one on jurisdiction only as to six defendants. The petitioner may or may not be the appellant on both appeals. Whoever the appellant may be, the result will then be "final" and on the merits as to two defendants, but it cannot then be any more "final" as to the other six defendants than it is today. If the jurisdictional judgment as to the six respondents should then be reversed, back to the District Court go the plaintiff and the six respondents for a second trial. Then, after a judgment on the merits, up to the Circuit Court of Appeals we go again. Questions: (1) Whose time is being saved? (2) How is the cause of justice and economy of review being advanced? The Circuit Court has at least as much work to do. The District Court has more.

Even one trial of this action will take longer than the average, and the time and expense of parties and counsel is doubled by two trials. Much of the evidence against the six respondents will be the same as the evidence against the two defendants who have appeared. But under the decision of the Circuit Court of Appeals it may have to be presented twice and reviewed twice on appeal.

Hohorst v. *Hamburg-American Packet Co.*, 148 U. S. 262, cited in the decision below, involved the appellate jurisdiction of *this* Court to review "judgments or decrees" and not the jurisdiction of a circuit court of appeals to review "final decisions". It also was concerned with a complaint which

specifically alleged "joint" liability (see *infra* pp. 14-15). But even if the *Hohorst* case and the construction placed by it upon the statute there involved were deemed controlling here, their application to the facts of this case would not only violate orderly procedure but would depart from the trend of later decisions of this Court in favor of the expeditious hearing of appeals from judgments which terminate the action as to a particular and separable phase thereof, or as between all parties to such a separable phase:

Reeves v. *Beardall,* 316 U. S. 283: Judgment dismissing one of three counts in complaint held final and appealable.

Clark v. *Williard,* 292 U. S. 112: Determination in insolvency proceedings held final where disputed claims of title as between liquidator and judgment creditors were disposed of although case had been remanded for further judicial proceedings as to controversies between liquidator and others not parties to appeal.

Lamb v. *Cramer,* 285 U. S. 217: Judgment dismissing a civil contempt proceeding for want of jurisdiction, held final and appealable, although brought solely in aid of an equity suit which had not been finally determined.

Wilson v. *Republic Iron & Steel Co.,* 257 U. S. 92: Judgment dismissing an action for the plaintiff's failure to pay costs held final although "it leaves the merits undetermined and may not be a bar to another action" (257 U. S., at p. 96).

The simple statute here subject to interpretation was designed to prevent the very situation into which the Circuit Court of Appeals has now thrust the parties to this action. This Court surely cannot now sanction such misconstruction.

POINT II.

The District Court judgment, which has finally determined a controversy distinct from the general subject-matter of the litigation and as between all the parties to such controversy, is final and appealable.

In determining the finality and appealability of lower court decisions, this Court has always recognized that there may be independent judicial review of a final determination of some matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, without awaiting the termination of the entire litigation. *Hill* v. *Chicago & Evanston Railroad Co.*, 140 U. S. 52; *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411; *Clark* v. *Williard*, 292 U. S. 112.

In this case the District Court has decided that six of eight defendants (the respondents herein) may not be sued in New York on the ground that they are not doing business there (R. 48-49). The determination of this jurisdictional controversy, which is wholly independent of the general subject of the litigation, is final and complete. The respondents have been permanently relieved of any legal responsibility in the forum of this litigation. So far as they are concerned, "there is nothing more to be decided." cf. *Clark* v. *Williard, supra,* 292 U. S. 112, at p. 118.

The present status of this action may well be described by the language of this Court in *Hill* v. *Chicago & Evanston Railroad Co., supra,* 140 U. S. 52, which involved an appeal from a decree dismissing the suit as to certain defendants for want of equity. In accepting jurisdiction of the appeal, the Court held the decree to be final, even though the case was still open below with respect to another issue affecting the remaining defendants. The undetermined issue was, in the Court's words:

"* * * a severable matter from the other subjects of controversy and did not affect their determination. The fact that it was not disposed of did not change the finality of the decree as to the defendants against whom the bill was dismissed; * * *. They were no longer parties to the suit for any purpose. * * * All the merits of the controversy pending between them and the complainant were disposed of, and could not be again reopened, except on appeal from that decree. * * *" (140 U. S., at p. 54).

So in this case, an appeal from the District Court's judgment is the only remedy available to the petitioner against the six respondents. The case falls within the rule enunciated in *United States* v. *River Rouge Improvement Co., supra,* 269 U. S. 411, at p. 414, that:

"* * * an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation."

POINT III.

The cases relied upon by the Circuit Court of Appeals below are not applicable to this case.

Only two authorities were cited by the learned Court below: *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262, and *Atwater* v. *North American Coal Corp.*, 111 F. (2d) 125 (C. C. A. 2d, 1940). The former, it is submitted with the utmost respect, is wholly distinguishable from this case, both on the statute subject to interpretation (*supra*, p. 10), and on the facts. The latter is one of the Second Circuit's own earlier decisions which also apparently adopted a narrow, legalistic interpretation of the rule of the *Hohorst* case, without regard to practical consequences.

The *Hohorst* case involved a bill filed against a German corporation and five individuals for infringement of a patent. After all defendants had appeared generally, the complainant amended his bill (1) to insert the word "jointly" in the allegation which recited the defendants' infringement, and (2) to charge the individual defendants with being copartners and local agents and managers of the foreign corporate defendants (148 U. S., at p. 263). The corporation thereupon obtained an order that unless the complainant withdrew his amended complaint as to it and stipulated to go to trial against it on the original complaint, its notice of appearance would be amended into a special appearance, service of the subpoena set aside, and the complaint dismissed as against the said defendant (38 Fed. 273). The complainant stood his ground; the bill was dismissed as to the corporation, and the complainant appealed directly to this Court. In dismissing the appeal, this Court held the decree below was not final, and expressly distinguished the rule enunciated in *Hill* v. *Chicago & Evanston Railroad Co.*, *supra*, 140 U. S. 52, that final decisions as to separable controversies are appealable, saying (148 U. S. at p. 266):

"* * * But this case presents no such aspect. Complainant insisted, by his amended bill, that the alleged liability was joint, and that 'all the defendants have cooperated and participated in all the said acts and infringements.'"

The *Hohorst* complaint thus expressly charged *joint* liability. In this case, the petitioner has made no such charge. He has, for the sake of convenience, joined in a single lawsuit eight defendants, as to each of which *several*, as distinguished from joint, liability is alleged (R. 26-32). The several character of the alleged liability was utterly ignored by the Court below.

In this case, the complaint is more analogous to that in *Curtis* v. *Connly*, 264 Fed. 650 (C. C. A. 1st, 1920), aff'd. 257 U. S. 260, which involved a suit by the receiver of a national bank charging former directors with personal liability for losses. The court rejected a contention that a decree in favor of six out of twenty-one defendants was not final, saying (264 Fed., at p. 651):

"* * * We think this contention is without merit. On the allegations of the bill, each defendant is under a separate liability, and a separate action of law might have been brought against him. The decree in favor of these six defendants is therefore a final decree, from which an appeal lies under the statute. U. S. Comp. Stat. 1916, §1120; Hill v. Chicago, etc., R. R., 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331. *We agree with counsel for the plaintiff that each defendant is under a several liability; that, in effect, we are dealing with 21 lawsuits combined into one equity suit.*" (Italics supplied.)

The decision of the Circuit Court of Appeals here holds, in effect, that an action joint in form only is therefore joint in substance.

POINT IV.

The existing conflict among the decisions of the Circuit Courts of Appeals should be resolved by this Court in accordance with the principles announced in *Reeves* v. *Beardall*.

The position taken in this case by the Second Circuit Court of Appeals is inconsistent with that of *Thompson* v. *Murphy*, 93 F. (2d) 38 (C. C. A. 8th, 1937). The Court there accepted jurisdiction of an appeal from an order quashing the service of process as to all but two of the defendants, who appeared generally and filed answers. The Court observed that "The order appealed from completely determines the rights of the parties affected by it," and that "the defendants who are affected are not claimed by the plaintiff to be jointly liable with the answering defendants" (93 F. [2d], at p. 40). The Court does not appear, however, to have attached much importance to the question of joint liability, in view of the following statement (93 F. [2d], at p. 40):

> "* * * The controversy here is wholly between the appellant and the appellees over *the question of the jurisdiction of the court below, a question which is collateral to and separate and distinct from the subject of the litigation* and does not affect the answering defendants. *There is no reason why a review of the order should have to await the outcome of the trial of this suit in the court below as to the answering defendants, and every reason why it should not.* There should be but one trial of this case upon its merits as to all defendants." (Italics supplied.)

See also, *Moss* v. *Kansas City Life Ins. Co.*, 96 F. (2d) 108 (C. C. A. 8th, 1938).

Indeed, a degree of scholarly doubt appears to exist within the Second Circuit Court of Appeals itself, as that bench is presently constituted. See *United States* v. *243.22 Acres of Land,* 129 F. (2d) 678 (C. C. A. 2d, 1942):

> "'Final' is not a clear one-purpose word; it is slithery, tricky. It does not have a meaning constant in all contexts." (Frank, *J.,* 129 F. [2d], at p. 680.)

See also, Note, 3 *Moore's Federal Practice,* 1942 Supplement, pp. 123-133, and the cases cited therein; *Collins* v. *Metro-Goldwyn Pictures Corp.,* 106 F. (2d) 83 (C. C. A. 2d, 1939), analyzed in Note 49 *Yale L. J.* 1476.

The most recent example of the modern trend is the enlightened holding of this Court in *Reeves* v. *Beardall,* 316 U. S. 283, upholding appealability of a judgment dismissing one of three counts. This Court's unanimous opinion commented (316 U. S., at p. 285):

> "* * * Such a separate judgment will frequently be a final judgment and appealable, though no disposition has been made of the other claims in the action. Bowles v. Commercial Casualty Ins. Co., 107 F. 2d 169, 170. That result promotes the policy of the Rules in expediting appeals from judgments which 'terminate the action with respect to the claim so disposed of', though the trial court has not finished with the rest of the litigation. * * *"

The finality of the District Court's judgment in the instant case was also no less complete as to the six respondents than was the finality of the ruling reviewed by this Court in *Rosenberg Co.* v. *Curtis Brown Co.,* 260 U. S. 516, with respect to the single defendant involved in that case.

The conflict between the Eighth Circuit decisions and the view of three learned members of the Second Circuit, as

expressed in this case and in *Atwater* v. *North American Coal Co., supra,* 111 F. (2d) 125, should be resolved in favor of appealability and a practical interpretation of the statute, which is consistent with its intent and with the modern trend of the decisions.

A clarification by this Court of the conflict and confusion which exists today in this division of appellate jurisdiction, and a reaffirmation of the original practical theory and purpose of the "final decision rule", with which the Second Circuit view is not consistent, would save the time and resources of countless litigants and their counsel and of the courts themselves. Even if this Court should believe the *Hohorst* case stands between this petitioner and orderly and reasonable procedure, which it is respectfully submitted it does not, the repudiation of that decision at this time will be consistent with the high purpose of this Court and the pragmatic necessities of modern times.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise of this Court's supervisory powers, in order that a vital question of federal appellate jurisdiction may be settled, and that to such an end a writ of certiorari should be granted and this Court should review the determination dismissing petitioner's appeal herein and finally reverse it.

Dated: April 24, 1944.

Respectfully submitted,

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